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SCRUTINY

The House of Lords and Religious Clothing in *Begum* v. *Head teacher and Governors of Denbigh High School*

Gareth Davies*

Introduction

In 2002 Shabina Begum, then a student at Denbigh High School in Luton, decided that as a Muslim she was obliged by her religion to wear the jilbab, a form of loose clothing that conceals the shape of the body. The jilbab is commonly worn by Muslim women in many areas of the Middle East and Southeast Asia. Muslim women in Pakistan, India and Bangladesh, where most British Muslims have their roots, more commonly wear the shalwar kameeze, a more fitted garment.

The dress code at Denbigh High does not permit the jilbab, and the school was not inclined to change its rules. As a result Ms Begum stopped going to school and began legal action claiming a violation of her Article 9 ECHR right to freedom of religion, as protected in the UK by the Human Rights Act 1998.

The judge at first instance found against her, but the Court of Appeal reversed that decision.[1] It found that the school dress code might well be justifiable under

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[1] At first instance; *R (on the application of Begum (by her litigation friend, Rahman))* v. *Head teacher and Governors of Denbigh High School* [2004] EWHC 1389 (Admin; [2004] ELR 374. On appeal; CA [2005] EWCA Civ 199; [2005] 1 WLR 3372. Annotations; Poole, 'Of Headscarves and Heresies: The Denbigh High School case and public authority decision making under the Human Rights Act' [2005] PL 685; Davies, 'Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v Denbigh High School*' (2005) 1:3 European Constitutional Law Review 511; A. Blair and W. Apps, 'What not to wear and other

Article 9(2), for example in the cause of protecting the rights and freedoms of others. However, in responding to Ms Begum's request to wear the jilbab the head teacher and governors were obliged to consider her right to religious freedom, as well as other interests, such as harmony in the school, and find the appropriate balance. In fact they had merely considered the interests of the school as a whole and of other pupils, and had not accorded any weight in their decision making to Ms Begum's Article 9 right. They simply took the view that she should obey the rules. Thus while, upon a new consideration it was quite possible that they would be able to justifiably arrive at the same answer, in the absence of evidence of a balanced consideration of her complaint the school's decision was annulled.

The House of Lords has now reversed this decision.[2]

2. The House of Lords Judgments

2.1 The Procedural Approach

The Court of Appeal emphasized procedure as a way to protect substantive rights. It was difficult for judges to second-guess head teachers, but what they could do was make sure they had considered all the relevant factors with due seriousness. Lord Justice Brooke, in the leading CA judgment, produced an Article 9 checklist which head teachers could use to make sure their decisions were legally sound, requiring them to consider the impact of their decisions on the student, to critically assess what it was they wished to achieve with this policy, and to ask how necessary and proportionate their rules were, and so on.[3]

Four of the five judges in the HL rejected this approach, Baroness Hale not addressing the point. It was unreasonable to expect non-lawyers such as head teachers and governors to think in terms of human rights, and follow the argumentative structure of Article 9.[4] They took the view that the ECHR did not contain procedural requirements, but substantive ones. It does not matter how national authorities make their decisions, as long as they do not, in fact, violate rights: 'what matters in any case is the practical outcome, not the quality of the decision-making process

stories: addressing religious diversity in schools' (2005) 17 Education and the Law 1; Scolnicov, 'A dedicated follower of (religious) fashion' (2005) 64 CLJ 527. For comparison with the position in other European countries see O. Gerstenberg, 'Germany: Freedom of conscience in public schools' (2005) 3 International Journal of Constitutional Law 94; K. Berthou, 'The Issue of the Voile in the Workplace in France: Unveiling Discrimination' (2005) 21 International Journal of Comparative Labour Law and Industrial Relations 281. For context see G. Anthony, 'Public Law, Pluralism and Religion in Europe: Accomodating the Challenge of Globalisation' (2006) 17 ERPL 47.

2 [2006] 2 WLR 719; [2006] UKHL 15.

3 Paras 75-76 CA, note 1 above.

4 Even, apparently, if they had help from solicitors: para. 31 HL, note 2 above.

that led to it'.[5] Lord Bingham said that procedure could not be used as a way of avoiding the difficult question of the ban's legitimacy; the Court must face that squarely and decide it 'objectively'.[6]

2.2 Was There an Interference With Religious Freedom?

Article 9 ECHR provides that limitations of religious freedom may be justified by other interests. Lord Nicholls and Baroness Hale felt that the limitation in this case was so justified. Lords Hoffmann, Scott and Bingham however felt that there was no interference (the word they preferred to 'limitation') and so no need to consider justification.

Lord Bingham summarized the position most clearly: 'The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religious without undue hardship or inconvenience'.[7] Given that Ms Begum had known of the dress code when she began at Denbigh High, and indeed had complied with it for two years before she felt the need to wear the jilbab, and given that there were other schools in the area which permitted the jilbab and there was 'no evidence to show that there was any real difficulty in her attending one or other of these schools', there was no interference.[8] The reasoning of Lords Hoffmann and Scott was similar, although Lord Hoffmann expressed some concerns about the precise standard of difficulty necessary. He noted with doubt the view derivable from one case that interference would only arise if it had been 'impossible' for Ms Begum to find another school. It was not necessary to decide this since it did not appear to have been even 'difficult'.[9]

2.3 Was Any Interference Justified under Article 9(2)?

Four of the five judges agreed that the dress code was or would be justified by the need to protect the rights and freedoms of others, one of the grounds referred to in Article 9(2).[10] Lords Bingham and Hoffmann considered this in the alternative,

[5] Para. 31.

[6] Para. 30.

[7] Para. 23.

[8] Para. 25.

[9] Paras 51-52.

[10] See generally J. Martínez-Torrón, 'Limitations on Religious Freedom in the Case Law of the European Court of Human Rights' (2005) 19 *Emory International Law Journal* 587.

since they found no interference anyway, whereas Lord Nicholls and Baroness Hale made this the basis of their decision. Lord Scott did not consider the matter.

The threats to these others can be grouped into three types, all of which were referred to in different ways in the judgments. Were the school to amend its dress code to allow the jilbab then girls who did not in fact wish to wear it might be pressured into doing so by family or friends, and seen as 'less good' Muslims if they did not do so. Hence their religious freedom would be limited. Secondly, allowing the jilbab would create two categories of Muslims within the school, which might lead to conflict, threatening the harmony and good functioning of the school as a whole, and therefore being detrimental to the rights and freedoms of at least some pupils within it. Thirdly, some pupils and teachers associated the jilbab with extreme or fundamentalist views, and would find its presence intimidating. Hence a prohibition protected them.

These questions are of course factual ones, and the reasons that their Lordships gave for accepting them varied. [11]

Lord Hoffmann deferred to the trial judge, who he found to have had had 'ample material' for deciding that the scenarios were plausible.[12] He also, throughout his judgment, accorded great weight and respect to the evidence and opinions of the head teacher. The other judges also did this, Lord Bingham explaining that to second-guess the head teacher was out of the question. The school had the relevant expertise and was best placed to decide, and for a court to overrule it on 'a matter as sensitive as this' would be 'irresponsible'.[13] This must be seen as a refinement and limitation of his earlier remark that 'the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting … there is no shift to a merits review, but the intensity of review is greater than was previously appropriate'.[14]

A particular reason to defer to the head teacher was because it was a good school, and in particular because the head teacher seemed to be a good head teacher. The judgments abound with references to how the school had improved since the head teacher came to it, how it achieved above average results and had been harmonious and successful in recent years. Moreover, the head teacher could not be accused of being anti-Muslim. She was herself born in Bengal, and permitted headscarves and the shalwar kameeze. Therefore she both understood and respected Islam.[15]

An additional factor which seemed to greatly impress some of their Lordships, as it has also impressed the judges in the Court of Appeal, was that the uniform policy had been drawn up after wide consultation with Muslim authorities and

[11] The paragraphs in which their Lordships primarily address justifications are 33-34, 58, 65, and 98.

[12] Para. 58.

[13] Para. 34.

[14] Para. 30.

[15] See paras 5, 34, 43, 74.

was held by many to be compatible with mainstream Muslim dress requirements. This was taken by their Lordships as evidence of the fairness and tolerance of the school decision-makers.[16]

One consequence was that Ms Begum's desire to wear the jilbab was treated as somewhat odd, and, being, according to the school, not a mainstream Islamic position, taken less seriously. Lord Scott even thought it 'extraordinary' that a Muslim girl might not regard the shalwar kameeze as sufficiently modest.[17] Lord Hoffmann however stated that whether or not the majority of Muslims wore one outfit did not make the belief of a minority that another was necessary any less genuine or worthy of respect.[18] Nevertheless he shared the view of his colleagues that the school's uniform policy should prevail.

2.4 The Liberal Argument

Baroness Hale considered that the responsibility of schools and the state was not just to allow freedom of religion but also to provide a place where children could be free from it. In order to develop as individuals and find their own thoughts, the state should protect them from their surroundings and family, and pressures which might limit their own freedom of choice.

The tension which this thought captures is between the role of the state and that of the family in raising children.[19] What are the limits of their justifiable roles and powers, and when should the state assert limits to the family? Everyone may accept freedom of religion as an abstract principle, but freedom for families, or for individuals, notably women and girls? The two may not be compatible, and a restriction on religious expression may serve the liberty of the latter to a greater extent. As Baroness Hale argued, this is a fortiori when it is girls who are involved. To doubt the choice of adult women raises many difficult questions, but to accept the choices of girls as being automatically and authentically their own is equally difficult.

[16] Several judges also mentioned that the fact that the school allowed the shalwar kameeze and headscarf indicated that it respected diversity and was flexible, clearly implying that Ms Begum's case was thereby weakened (see paras 34, 83, 98). This is diversity as some kind of box to be checked, after which one can move on. On the contrary, it is an ongoing obligation. The idea that tolerating one religious group can reduce or remove the obligation to respect another is odd.

[17] Para. 83.

[18] Para. 50.

[19] See L. Lundy, 'Family Values in the Classroom? Reconciling Parental Wishes and Children's Rights in State Schools' (2005) 19 *International Journal of Law, Policy and the Family* 346; M. Levinson, 'Liberalism Versus Democracy? Schooling Private Citizens in the Public Square' (1997) 27 *British Journal of Political Science 333*; F. Radnay, 'Culture, Religion and Gender' [2003] 1 *International Journal of Constitutional Law* 663, cited by Baroness Hale.

She did not take her argument to the conclusion that there should be, for example, no religious schools, and nor did she rely on it exclusively in her final decision. It was for her an additional reason why the school's decision could be justified.

3. Comment

The proposition that there was no limitation of religious freedom is not wholly convincing. Their Lordships relied on a number of ECHR cases in which rules impacting on religious practice were not found to be limitations. These include employers requiring employees to work on Sundays, and rules concerning animal welfare under which kosher slaughtering was illegal.[20]

What their Lordships did not address is the distinction between rules that are not in any sense intended to be regulation of religion or religious expression, but have some incidental effect on it – such as the above examples – and those whose effect on religious expression is part of their purpose and intent. Examples of the latter include rules prohibiting certain kinds of religious clothing because it is religious clothing (rather than simply because it is e.g. unsafe for a fireman or motorcyclist). In almost all ECHR cases involving such rules, and in both of the most recent and leading cases, *Dahlab* and *Sahin*, which concerned, respectively, schools and universities prohibiting the Islamic headscarf, the Court of Human Rights, in *Sahin* in Grand Chamber, emphasized that the rules were limitations on religious freedom.[21] Contrary to the suggestion of Lord Hoffmann,[22] a careful reading of *Sahin* does not unequivocally suggest that a limitation was only found in that case because there were no alternative Turkish universities where the headscarf did not apply. The Court of Human Rights seems rather to have adopted the straightforward position, as in *Dahlab*, that a deliberate prohibition of religious clothing by a public institution falls within Article 9 and must be justified.[23]

It is the consideration of possible justifications that is the most interesting part of *Begum*. Both courts and societies in Europe will find that balancing religious freedom against the justifications for restricting religious clothing is politically and

[20] See *Stedman* v. *United Kingdom* (1997) 23 EHRR CD 168; *Konttinen* v. *Finland* (1996) 87-A DR 68; *Ahmad* v. *United Kingdom* (1981) 4 EHRR 126; *Jewish Liturgical Association Cha'are Shalom Ve Tsedek* v. *France* (2000) 9 BHRC 27.

[21] *Dahlab* v. *Switzerland* no 42393/98 (dec) ECHR 2001-V; Application no 4474/98 *Sahin* v. *Turkey* (2005) 41 EHRR 8 (Chamber); Judgment of 10 November 2005 (Grand Chamber).

[22] Para. 59.

[23] For fuller discussion of this point see Davies, '(Not Yet) Taking Rights Seriously: the House of Lords in *Begum* v. *Head teacher and Governors of Denbigh High School*' Human Rights and Human Welfare Online Working Paper no. 37, available at <www.du.edu/gsis/hrhw/working> or <ssrn.com>.

legally unavoidable for some time to come,[24] and this is the House of Lords' first chance to share its views.

One of the justifications which their Lordships accepted is a bad one. The fact that some pupils or teachers regarded those in the jilbab as extremists or frightening is not a legitimate reason for restriction unless those fears can be objectively justified. If Ms Begum, or other jilbab wearers, could be accused of threatening behaviour, or of not respecting the rights of others who do not wear it, then the case would be different. However, that accusation was not made, and if it had been then the appropriate response might have been to deal with the unacceptable behaviour, rather than the clothing. After all, it is hard to imagine that prohibiting the jilbab changes the views or character of those who wish to wear it.[25] By contrast, the head teacher, and their Lordships, seem to be treating the reactions of others as a *per se* legitimation for restriction,[26] rather like the golf club which does not allow women, Jews or black people because it would disturb the other members. As one commentator said 'that students claimed to fear those students wearing the jilbab is clearly not a good reason. Schools should not pander to prejudice'.[27]

The better argument concerned the risk that allowing the jilbab would cause girls to be pressured into wearing it, restricting their religious freedom. This is related to Baroness Hale's view that schools should provide a place where children can be free of external religious demands. It is certainly a real potential risk, and should be taken seriously. However, it also demands a more critical examination than the House of Lords gave.

Firstly, the argument, even if correct, is not decisive on its own. The ECHR requires that the rights that a ban protects are balanced against the rights that it infringes – here Ms Begum's.[28] The school did not however even claim that it

[24] See Anthony, note 1 above.

[25] Of course, the intention behind a ban might be to cause these pupils to leave the school, but there is no reason to think that was the case here, and it would not be an acceptable justification.

[26] Especially para. 65, per Lord Hoffmann; 'that takes no account of the school's wish to avoid clothes which were perceived by some Muslims (rightly or wrongly) as signifying adherence to an extremist version of the Muslim religion'. The suggestion is that the justifiability of the perception is irrelevant.

[27] Scolnicov, 'A dedicated follower of (religious) fashion' (2005) 64 CLJ 527 at 528. Contra, Lord Hoffmann, *ibid*.

[28] *Sahin*, note 21 above at 107-108, and Judge Telkens. See also C. Evans, *Freedom of Religion Under the European Convention on Human Rights* (OUP, 2001) at 146-147; S. Van Drooghenbroeck, *La Proportionnalité dan le Droit de la Convention Europeènne des Droits de l'Homme* (Brussels: Bruylant, 2001); *National Union of Belgian Police* v. *Belgium* (1979-80) 1 EHRR 578, at 579, where the Court asks whether 'the disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued by the Government'. On the balances religious freedom requires see R. Fahlbeck, 'Ora et Labora – On Freedom of Religion at the Work Place: A Stakeholder cum Balancing Factors Model' (2004) 20 *International Journal of Comparative Labour Law and Industrial Relations* 27. See also (an ironic reference, in the circumstances) Lord Bingham at para. 32.

had weighed these against each other. It said that it had a policy acceptable to most Muslims, protective of some, and in the interest of the school as a whole and therefore she should accept it. The House of Lords, wrongly, accepted this as sufficient.

Nor would such a balance be so very easy to make. As well as requiring some quantification of the numbers of girls likely to suffer or gain from a ban, one must ask whether it is worse to be forced by parents or peer pressure to wear something one dislikes than denied the right by a school to wear something one believes one should, or that modesty requires.[29] This requires some awareness of equality issues, given the prohibition on discrimination in human rights found in Article 14 ECHR. Is the seriousness attributed to the risk of girls being pressured into wearing the jilbab commensurate with the approach taken to teenagers whose families are strictly Christian or Jewish and also force them to dress according to certain norms of modesty.[30] It is suggested that there is a certain discrepancy between widespread (and understandable) legal and social nonchalance about the latter, where the pressures and power of family are accepted as inevitable, and something approaching panic about the former. Can this difference be justified?

One would expect many of these points to raise evidential questions.[31] The ban's legitimacy cannot turn merely on an unsupported assertion of risk, but on whether these risks of pressure, of unrest, and of spreading extremism, are actually real and as significant as the school claimed.[32] In the first instance judgment this was accepted on the basis of the evidence of several teachers, including the head teacher.[33] However, their evidence was somewhat impressionistic, and relied to an extent on the expressed views of schoolgirls. While these are relevant, it should also be remembered that those girls opposing the jilbab are likely to have differing religious views to Ms Begum. Allowing one group of teenagers to assess the threat posed by a religiously different teenager has obvious risks.

[29] The position is of course compex, there being many reasons for wearing or not wearing religious clothes. See E. Tarlo, 'Reconsidering Stereotypes: Anthropological Reflections on the Jilbab Controversy' (2005) 21 *Anthropology Today* 13; D. Lyon and D. Spini, 'Unveiling the Headscarf Debate' (2004) 12 *Feminist Legal Studies* 333. On the question of modesty see Davies, 'Banning the Jilbab', note 1 above, at 526-527.

[30] See Apps and Blair, note 1 above, on these equality issues.

[31] On these evidential issues see S. Knight, 'Religious Symbols in Schools: Freedom of Religion, Minorities and Education' (2005) 51 EHRLRev 499 at 513-515.

[32] See Judge Tulkens' dissenting judgment in *Sahin* v. *Turkey* (Grand Chamber) on the importance of 'in concreto' evidence of a 'pressing social need' rather than just 'abstract arguments'. Her judgment is probably the most carefully reasoned and coherent discussion of religious clothing that a court in Europe has yet produced. See also *Smith and Grady* v. *United Kingdom* (Application nos 33985/96 and 33986/96) where the European Court of Human Rights found that derogations from rights could not be justified by mere assertions of risk. Concrete and specific evidence was required. See para. 89 of the judgment, and further citations therein.

[33] *Begum*, note 1 above.

Indeed, Ms Begum is a member of a minority of British Muslims, although a significant group globally, who prefer the jilbab to the shalwar kameeze and headscarf. She found herself in a school where most of the other girls, and the head teacher, came from a tradition in which these latter are normal wear for Muslim women. In that situation the tolerance that the school showed for the shalwar kameeze and headscarf, and the head teacher's own background, should be reasons for critical examination of the policy quite as much as they are evidence of its tolerance and wisdom.[34] They raise the spectre of intra-religious intolerance. That is particularly the case given that one of the arguments put forward against the jilbab was that it would create divisions in the school. There were of course already divisions; between girls who wore the headscarf and those who did not. Why should a new division between headscarf and jilbab be so problematic? Could it be that the mainstream religious group has a particular difficulty with minority branches? That would not be so very surprising. However, as the European Court of Human Rights has said, the appropriate response in such a case is to create a context in which different groups get along, not to eliminate the presence of the groups which the majority dislike.[35]

Yet by contrast, the fact that the uniform policy was acceptable to the majority was used by the school, and the House of Lords, to undermine Ms Begum's position. She was assimilated to the mainstream with striking ease. Perhaps there was no prejudice involved, and it is certainly not the intention here to make any accusation, but the attitude of the majority to the minority deserved consideration. Can one imagine a Catholic interpretation of the Bible being accepted by a court as support for restricting expression of a contrary Protestant view?

With their lack of critical or probing analysis, the judgments are in substance an endorsement of a marginal review of the school's decision. Lord Bingham was explicit and representative in thinking it appropriate to defer to the head teacher's expertise,[36] and Lord Hoffmann considered that the decentralization of the dress codes to schools meant that the margin of appreciation should be considered to be decentralised too.[37] It is clear that her personal qualities and ability as a head teacher played an important role here. Both her background as a Muslim, and her good record as head, were taken as reasons for deference.[38]

These may certainly be relevant, but it is suggested that most readers of the judgments will find the degree of emphasis on the head teacher's excellence slightly odd, even disturbing. Even excellent teachers can make errors of judgment,[39] and

[34] See Davies, 'Banning the Jilbab', note 1 above, at 526.

[35] *Sahin*, note 21 above, Grand Chamber Judgment at para. 107, and citations therein.

[36] Paras 33-34.

[37] Paras 63-64.

[38] See paras 5, 33-34, 43.

[39] On deference to teachers see D. Monk, '(Re)constructing the head teacher: legal narratives and the politics of school exclusions' (2005) 32 *Law and Society* 399.

the *ad personem* argument is given too much weight. This impression is increased by a number of disapproving references to Ms Begum's attitude, and that of her brothers, and in particular to their attempts to invoke human rights arguments.[40] While an assertive pupil may not always be attractive to authority it is suggested that the disapproving tone taken by their Lordships is regrettable. How are rights to be protected if they cannot be asserted? In any case, it is not clear what relevance Ms Begum's likeability, or that of her brothers, has to her case.[41]

4. Conclusion

Their Lordships seem to have conflated two issues. One is the degree of discretion which a decision-maker should have, which it is suggested they were right to think is broad. The other is the intensity with which a court should examine whether the correct factors were considered in exercising that discretion. Here Lord Bingham stated that a higher intensity was appropriate than for normal judicial review, but the judgments do not reflect this, because of over-reliance on the teacher's assessments. The consequent risk, which these judgments manifest, is that decisions which do not accord sufficient respect to rights will not be exposed because review is superficial, but this will be treated as a margin of discretion matter. Schools may be allowed variation in value choices and balancing, but to ensure the protection of rights courts must engage in review sufficiently intense to establish what choices and balances the school has in fact made.

Further, in rejecting as too complex the Court of Appeal's procedural constraints on decision-making, the House of Lords seems to have relieved schools of any obligation to consider religious freedom as such. This may make their life easier, but it also makes it more likely that decisions will be unbalanced, and marginal risks will be used to justify disproportionate restrictions. Deference to head teachers will make this hard to expose, and the procedural bathwater may carry away the baby of substantive and enforceable rights.

[40] Paras 10, 46, 79-80.

[41] See Monk, note 38 above.

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